BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

GALE F. EWING Claimant	)	
VS.	)	
PHILLIPS COUNTY Respondent	)	Docket No. 1,035,752
AND	)	
KANSAS WORKERS RISK COOPERATIVE FOR COUNTIES Insurance Carrier	)	

ORDER

STATEMENT OF THE CASE

Respondent and its insurance carrier (respondent) requested review of the June 5, 2008, Award entered by Administrative Law Judge Bruce E. Moore. The Board heard oral argument on September 3, 2008. Jeffrey E. King, of Salina, Kansas, appeared for claimant. Mickey W. Mosier, of Salina, Kansas, appeared for respondent.

The Administrative Law Judge (ALJ) concluded that claimant suffered personal injury by accident arising out of and in the course of his employment with respondent, that his date of accident was June 5, 2007, and that he gave timely notice and written claim for the claimed injuries to his back. The ALJ further concluded that as a result of claimant's work activities and the deterioration of his back, claimant is permanently and totally disabled. The ALJ denied claimant's request for temporary total disability benefits. The ALJ found that claimant's medical expenses with Dr. Christopher Kent and the costs of his MRI examination were unauthorized and are reimbursable only to the extent of the $500 maximum unauthorized medical allowance. The ALJ further ordered that future medical would be considered upon proper application.

The Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

Respondent asserts that claimant did not suffer a compensable work-related injury, arguing that claimant's injury did not arise out of and in the course of his employment and that claimant failed to provide notice of his alleged injury within the requisite 10-day period or timely written claim. In the event the Board finds that claimant suffered a compensable injury, respondent argues that claimant is not permanently totally disabled. Respondent also argues that claimant is not entitled to a work disability because he failed to make a good faith effort to either keep his job or obtain an accommodated position.

Claimant requests that the Board affirm the ALJ's findings that he met with personal injury by accident that arose out of and in the course of his employment, that he gave respondent timely notice and written claim, that he is entitled to future medical, and that he is permanently totally disabled.

The issues for the Board's review are:

(1) Did claimant suffer personal injury by a series of accidents that arose out of and in the course of his employment with respondent?

(2) If so, what is the date of accident for the series for purposes of determining whether claimant gave timely notice and written claim?

(3) Did claimant provide respondent with timely notice?

(4) Did claimant provide respondent with timely written claim?

(5) What is the nature and extent of claimant's disability?

(6) Did claimant make a good faith effort to retain his employment with respondent or find other employment?

FINDINGS OF FACT

Claimant is 58 years old and had worked for respondent for 23 years as a heavy equipment operator. He has a condition known as psoriatic arthritis, which causes him pain in his joints. He has been treated for psoriatic arthritis for a number of years.

In 2005, claimant started having low back pain that would come and go. He sought treatment from his personal physician, Dr. Thomas Smith, who referred him to a neurosurgeon, Dr. Daniel Noble. Claimant saw Dr. Noble on July 19, 2005. Dr. Noble wanted claimant to consider low back surgery. However, Dr. Smith advised claimant not to undergo surgery due to the arthritis medication he was taking. Neither Dr. Smith nor Dr. Noble told claimant what they thought was causing his low back problems. Claimant

continued doing his normal job at respondent, but his back continued to get worse. The pain started radiating down his legs, and his feet would start to burn.

Claimant saw Dr. Smith again in February 2007 because of back problems. He was having problems getting in and out of, operating, and servicing the heavy equipment at work. He said the machines have no springs, and they ride very rough. The more claimant performed his job duties, the worse his back condition became. Dr. Smith placed a 20-pound weight limit on him and referred him to Dr. Christopher Kent.

On June 6, 2007, claimant was seen by Dr. Kent, who told claimant that he believed the continuous movement of the machines claimant was operating was the cause of his back complaints. This was the first time any doctor told claimant that his back problems were related to his work activities. Dr. Kent recommended that claimant take three weeks off work in an effort to help his back and gave him an off-work slip to that effect. He recommended that claimant avoid jumping, climbing, bending, and kneeling. He specifically told claimant that it was time for him to quit operating heavy equipment.

Claimant believes he turned Dr. Kent's June 6, 2007, off-work slip over to his supervisor, Robert Oliva, that same day or the next day. He testified that when he turned the note over to Mr. Oliva, he told him what Dr. Kent had said in regard to his work activities and his back.

On June 28, 2007, claimant attempted to return to work after his three weeks off work, but he only lasted three or four hours. When he got in the grader, the burning in his feet returned and within a couple of hours he felt as badly as he did before his time off. He asked Mr. Oliva about any other positions with the County where he would not have to work with heavy equipment. Mr. Oliva said he would ask the county commissioners if there was any other work for him, but claimant never heard back from respondent about an accommodated job.

Claimant has been working a few hours a week delivering pizza for Pizza Hut, earning $7 per hour, since before he was seen by Dr. Kent. He works 20 hours or less per week and has to supply his own car and pay for his own gas. Pizza Hut has accommodated his condition, and if he needs to stop and clock out, Pizza Hut will let him. He has not looked for any other work since leaving his employment at respondent.

Claimant states that if he puts too much stress on his back, pain will start in his low back and progress down to his feet. He can only sit or stand for about 20 minutes at a time. On a good day, he can walk about two blocks. Bending and twisting activities bother him. When he was working at respondent, his pain would go down into both feet. At the present time, his left foot gives him more problems than his right. However, the pain will go into both feet if he does too much. He can only lift from 10 to 15 pounds without it bothering his back.

Claimant has been seeing Dr. Kent Blakely, a rheumatologist, since February 22, 1995, having been referred by claimant's family physician at that time. Dr. Blakely sees claimant every three to six months. He diagnosed claimant with psoriatic arthritis, an inflammatory arthritis similar to rheumatoid arthritis. Dr. Blakely has never limited claimant's activities as a result of his psoriatic arthritis.

When Dr. Blakely saw claimant in February 1995, he was complaining of back pain, but it was not his major complaint. Claimant's major complaint concerned the small joints in his hands and wrists. Dr. Blakely ordered a pelvic x-ray taken of claimant in 1995. Dr. Blakely was unable determine whether claimant had spondylolisthesis in 1995 by looking at the pelvic x-ray.

Claimant's back pain became severe in June 2005. At that time, claimant associated the pain with a cough. Dr. Blakely ordered an MRI, which revealed spondylosis and spondylolisthesis of L5 on S1. He said the spondylosis would have caused the spondylolisthesis. To Dr. Blakely's knowledge, the MRI done in 2005 was the first time the L5-S1 spondylolisthesis and spondylosis were diagnosed. Claimant later commented to Dr. Blakely that his pain increased after spending time in the road grader. Dr. Blakely opined that claimant's spondylosis and spondylolisthesis were caused by degenerative changes that could be aggravated by repetitive use or trauma. He believed that claimant's job activity as a heavy equipment operator aggravated the degenerative problems in his back.

Since claimant has not been working, he has not been having the same type of shooting pain and nerve ending pain going down his legs. Therefore, Dr. Blakely opined that it would be a reasonable recommendation that claimant continue to avoid operating heavy equipment because of his low back condition. Any vibration, jarring, constant lifting or those types of activities could cause degenerative changes in a spine, which would be consistent with the history given to Dr. Blakely by claimant.

Dr. George Fluter, who is board certified in physical medicine and rehabilitation, examined claimant on September 27, 2007, at the request of claimant's attorney. Claimant reported to Dr. Fluter that he had a back injury in the remote past but recalled no specific treatment for the condition. Claimant also reported that he had a history of psoriatic arthritis. Claimant reported gradually increasing back pain that radiated into his right foot and then into both feet. He was taken off work for three weeks, during which time the pain improved. However, claimant reported that when he returned to work, the pain came back.

At the time of Dr. Fluter's examination, claimant complained of constant pain across the middle to low back into both lower extremities. Claimant described the pain as shooting and burning and at a level of pain of 8 on a scale of 0 to 10. He also described numbness in his outer thighs and said at times he experienced weakness in his hips.

Dr. Fluter noted that an MRI performed on May 24, 2007, showed grade 1 spondylolisthesis of L5 on S1 with bilateral spondylosis. There was bilateral foraminal stenosis secondary to the spondylolisthesis. There were degenerative changes at L5-S1.

Dr. Fluter diagnosed claimant with chronic low back pain associated with bilateral lower extremity pain and dysesthesia. He also believed that claimant had lumbar spondylosis along with spondylolisthesis between L5 and S1. He opined that claimant's diagnosis was guarded and thought that it was not likely claimant would have significant improvement of his condition.

Based on the AMA *Guides*, Dr. Fluter rated claimant as having a 10 percent permanent partial impairment to the whole body based strictly on the structural findings. He recommended that claimant restrict lifting, carrying, pushing and pulling to 20 pounds occasionally and 10 pounds frequently; that he restrict bending, stooping, twisting, squatting, kneeling, crawling and climbing to an occasional basis; that he avoid prolonged sitting, standing and walking; and that he be allowed to change position as needed. Dr. Fluter believed that claimant should avoid operation of heavy equipment.

Dr. Fluter reviewed a task list prepared by Doug Lindahl. Of the 9 tasks on that list, Dr. Fluter opined that claimant was unable to perform 6 for a task loss of 66.7 percent. Based on the information he had concerning claimant's education, work history and restrictions, he did not think that claimant was capable of engaging in any type of substantial, gainful, full-time employment on a regular and consistent basis.

Dr. Fluter did not know when claimant's spondylosis or spondylolisthesis occurred. He did not think it happened over a period of days or weeks but could have been over a year, more or less. He said spondylosis is a type of fracture usually related to some microscopic repetitive trauma and is usually not caused by a single forceful traumatic event. Dr. Fluter thinks claimant's spondylosis was caused by or aggravated by his job as a heavy equipment operator.

Dr. Jeffrey MacMillan, a board certified orthopedic surgeon, reviewed claimant's medical records and the transcript of the deposition of Dr. Blakely at the request of respondent. Dr. MacMillan noted that an MRI report dated June 23, 2005, found that claimant had Grade 1 spondylolisthesis with bilateral pars defects at L5-S1. Dr. MacMillan explained that a pars defect is the result of a genetic predisposition towards failure of the pars interarticularis which occurs late in childhood or early in adolescence. In claimant's case, his pars defects would have occurred decades ago. As a result of the pars defect, instability was created across the L5-S1 motion segment, which caused abnormal mechanics across the L5-S1 disk. This resulted in accelerated degenerative disk changes at that level. Consequently, Dr. MacMillan opined that claimant's low back problems are the result of a combination of genetic predisposition, a developmental abnormality, and age-related degenerative changes. He did not see any evidence from the medical records that claimant's problems at L5-S1 were causally related to his work activities.

Dr. MacMillan stated that once an individual has reached skeletal maturity, the extent of spondylolisthesis will not increase. However, the frequency and intensity of his or her symptoms worsen over time. Symptoms wax and wane and can be affected by anything, including changes in the weather or changes in activity level, or could occur for no obvious reason. Dr. MacMillan would not give restrictions to a patient with a pars defect and Grade I spondylolisthesis unless that patient specifically requested restrictions. He said that degenerative changes are seen as often in a person with a sedentary job as laborers. Dr. MacMillan stated that there is nothing that can be readily identified that would cause, aggravate or accelerate degenerative disc disease, other than cigarette smoking. It is Dr. MacMillan's opinion that claimant's low back condition was not caused by his work activities, but the work activities could cause him low back pain.

Dr. Paul Stein, a board certified neurosurgeon, examined claimant on February 18, 2008, at the request of claimant's attorney. Claimant's chief complaint was low back and leg pain. He had a slight left-sided limp. Dr. Stein found that claimant had mildly positive straight leg raising, indicating some nerve root irritation in the low back. Dr. Stein diagnosed him with bilateral spondylosis at L5 and spondylolisthesis secondary to the spondylosis, probably with nerve root irritation. Dr. Stein opined that claimant's work activities were a significant aggravating factor for the underlying spondylolisthesis and also an aggravating factor accelerating the development of degenerative changes at L5-S1. He could not say that claimant's work activities made the spondylolisthesis worse, but the activities made it more symptomatic.

Dr. Stein testified that in a person with spondylosis, the amount of spondylolisthesis does not change once adulthood is reached but is fairly fixed, absent trauma or additional stresses on that particular area of the spine. He believes a person's spondylolisthesis condition can be accelerated by his or her vocation, particularly the secondary degenerative changes. Dr. Stein and Dr. MacMillan disagree on this point.

Dr. Stein believes that claimant has a 7 percent permanent partial impairment to the body as a whole. He recommended that claimant avoid lifting more than 30 pounds with any single lift up to twice a day, 20 pounds occasionally, and 10 pounds frequently but not continuously. He should avoid lifting from below knuckle height or above chest height, bending and twisting of the low back, and equipment that would subject him to repetitive jarring or impact. He should alternate sitting, standing and walking and should not be required to stand in one position for more than 15 minutes at a time.

Dr. Stein thinks it is unlikely that claimant is capable of engaging in any substantial, gainful employment because of his restrictions, his relatively small community, his limited education, and his limited job experience. Claimant should not continue with the work he had performed at respondent. Dr. Stein believed that operating heavy equipment would aggravate claimant's spondylosis but making pizza deliveries would just aggravate his symptoms.

Dr. Stein reviewed the task list of Doug Lindahl. Of the 9 tasks on the list, he opined that claimant would be unable to perform 6 for a 66.67 percent task loss.

Doug Lindahl, a vocational rehabilitation counselor, met with claimant at the request of claimant's attorney on November 5, 2007. They compiled a list of 9 tasks that claimant had performed in the 15-year period before his injury. At the time they met, claimant was 58 years old, had a high school diploma, and had taken a couple of classes in silver smithing from a community college. He had no other education or schooling. His work history was fairly limited.

Mr. Lindahl opined that considering claimant's restriction requiring him to alternate positions on an as-needed basis, no full-time jobs would be available to him. In Mr. Lindahl's opinion, the $150 per week claimant is earning delivering pizzas is basically all claimant has the ability to earn, and this does not meet the Social Security system's definition of what constitutes substantial and gainful employment.

Linda McDowell is Phillips County Clerk. As one of her duties, she is the personnel officer for Phillips County. She handles filing workers compensation reports of accident. She also handles applications for KPERS, retirement benefits, and disability benefits. After claimant had seen Dr. Kent, he brought Ms. McDowell the note indicating that he should be off work for three weeks. Claimant told her that Dr. Kent felt he needed the time off to rest his back and hopefully help his condition. Claimant also told her that Dr. Kent believed he needed to stop operating heavy equipment.

On June 21, 2007, claimant asked Ms. McDowell about the cost of health insurance if he was not able to go back to work. On June 27, 2007, claimant came back again and asked about KPERS disability. The next day, June 28, he came back into her office and said his attorney advised him to file a workers compensation claim for a back injury caused by repetitive motion while operating a grader. A written report of accident was prepared. Within a day or two, claimant returned to Ms. McDowell's office, and she filled out the paperwork for disability through KPERS.

Ms. McDowell did not think claimant worked any time after June 5, 2007. She said that she would have to check the time cards for that information. She said claimant drew sick leave and vacation until sometime in August 2007, after which he was not on the active payroll. She did not recall if claimant tried to go back to work on June 28.

Robert Oliva is the road supervisor for respondent and was claimant's immediate supervisor. Mr. Oliva was aware that claimant had a back condition before he started using sick leave and vacation leave in 2007. Claimant had informed Mr. Oliva that he had an ongoing back condition for several years, but he did not discuss with Mr. Oliva the cause of his back problems.

When claimant brought Mr. Oliva the June 6, 2007, off-work slip from Dr. Kent, they had a conversation, which included the following exchange:

> Q. [by respondent's attorney] . . . When [claimant] brought this note in to you on June the 6th or June the 7th, did he tell you then his back condition was due to riding the grader?
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> A. [by Mr. Oliva] No, he said that his back was hurting and he went to the back doctor and that he was going to stay off of running equipment for the duration of the note, to see if that would help rectify his back situation.[1]

Mr. Oliva said that claimant did try to work after this three-week period. He worked about half a day and then said the grader was bothering his back and he was not going to be able to do it. Claimant asked him to fill out a workers compensation form, and Mr. Oliva sent him to Ms. McDowell. Later claimant asked him if there was any other work he could do making the same wage he had been, but Mr. Oliva did not have anything claimant could do within his lifting restrictions. He told claimant that he would have to check with the county commissioners to see if there was any other work he could do. The matter was brought up for discussion before the county commission, but there was nothing they could come up with to keep claimant employed at the same wage level.

Lleanna Nelson is secretary of respondent's road and bridge department. Claimant brought her the slip from Dr. Kent dated June 6, 2007, taking him off work for three weeks. She made a copy of the slip and sent the original to Ms. McDowell. Claimant spoke to Mr. Oliva the day he brought in the slip, but she did not know what they discussed. There is nothing on claimant's time card to indicate that he worked after the three weeks he was off. She has no reason to doubt that claimant tried to come back to work on or about June 28, 2007, but those work hours are not shown on the time card.

(1) Did claimant suffer personal injury by a series of accidents that arose out of and in the course of his employment with respondent?

PRINCIPLES OF LAW

An employer is liable to pay compensation to an employee where the employee incurs personal injury by accident arising out of and in the course of employment.[2] Whether an accident arises out of and in the course of the worker's employment depends upon the facts peculiar to the particular case.[3]

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[1] Oliva Depo. at 21-22.

[2] K.S.A. 2007 Supp. 44-501(a).

[3] *Kindel v. Ferco Rental, Inc.*, 258 Kan. 272, 278, 899 P.2d 1058 (1995).

The two phrases arising "out of" and "in the course of" employment, as used in the Kansas Workers Compensation Act, have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable.

> The phrase "out of" employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. Thus, an injury arises "out of" employment if it arises out of the nature, conditions, obligations, and incidents of the employment. The phrase "in the course of" employment relates to the time, place, and circumstances under which the accident occurred and means the injury happened while the worker was at work in the employer's service.[4]

An accidental injury is compensable under the Workers Compensation Act even where the accident only serves to aggravate a preexisting condition.[5] The test is not whether the accident causes the condition, but whether the accident aggravates or accelerates the condition.[6] An injury is not compensable, however, where the worsening or new injury would have occurred even absent the accidental injury or where the injury is shown to have been produced by an independent intervening cause.[7]

K.S.A. 2007 Supp. 44-501(a) states in part: "In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends."

K.S.A. 2007 Supp. 44-508(g) defines burden of proof as follows: "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."

K.S.A. 2007 Supp. 44-508(d) states in part:

> 'Accident' means an undesigned, sudden and unexpected event or events, usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation of force. The elements of an accident, as stated

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[4] *Id.*

[5] *Odell v. Unified School District*, 206 Kan. 752, 758, 481 P.2d 974 (1971).

[6] *Woodward v. Beech Aircraft Corp.*, 24 Kan. App. 2d 510, Syl. ¶ 2, 949 P.2d 1149 (1997).

[7] *Nance v. Harvey County*, 263 Kan. 542, 952 P.2d 411 (1997).

> herein, are not to be construed in a strict and literal sense, but in a manner designed to effectuate the purpose of the workers compensation act that the employer bear the expense of accidental injury to a worker caused by the employment.

K.S.A. 2007 Supp. 44-508(e) states:

> "Personal injury" and "injury" mean any lesion or change in the physical structure of the body, causing damage or harm thereto, so that it gives way under the stress of the worker's usual labor. It is not essential that such lesion or change be of such character as to present external or visible signs of its existence. An injury shall not be deemed to have been directly caused by the employment where it is shown that the employee suffers disability as a result of the natural aging process or by the normal activities of day-to-day living.

ANALYSIS AND CONCLUSION

Claimant attributes his injury to the cumulative traumas he suffered while performing his regular job tasks for respondent each and every working day. Drs. Fluter, Stein and Blakely agree. Dr. MacMillan does not. Dr. Fluter opined that claimant's job operating heavy equipment caused trauma and injury to claimant's back. Drs. Stein and Blakely agree that claimant's job duties with respondent aggravated preexisting conditions in claimant's back, whereas Dr. MacMillan attributes claimant's back condition to the normal activities of daily living and the natural aging process.

The Board finds that the greater weight of the credible evidence proves that claimant's work activities aggravated and accelerated his preexisting back condition to a greater extent than did his normal activities of day to day living and the natural aging process standing alone. Accordingly, claimant has met his burden of proving that he suffered personal injury by a series of accidents that arose out of and in the course of his employment with respondent.

(2) What is the date of accident for the series for purposes of determining whether claimant gave timely notice and written claim?

PRINCIPLES OF LAW

K.S.A. 2007 Supp. 44-508(d) states in part:

> In cases where the accident occurs as a result of a series of events, repetitive use, cumulative traumas or microtraumas, the date of accident shall be the date the authorized physician takes the employee off work due to the condition or restricts the employee from performing the work which is the cause of the condition. In the event the worker is not taken off work or restricted as above described, then the date of injury shall be the earliest of the following dates: (1) The date upon which

> the employee gives written notice to the employer of the injury; or (2) the date the condition is diagnosed as work related, provided such fact is communicated in writing to the injured worker. In cases where none of the above criteria are met, then the date of accident shall be determined by the administrative law judge based on all the evidence and circumstances; and in no event shall the date of accident be the date of, or the day before the regular hearing. Nothing in this subsection shall be construed to preclude a worker's right to make a claim for aggravation of injuries under the workers compensation act.

ANALYSIS AND CONCLUSION

Dr. Kent took claimant off work and restricted claimant from performing the work which caused claimant's condition, but Dr. Kent was not an authorized physician. Accordingly, the date of accident for claimant's series of accidents is June 28, 2007, the date claimant gave written notice to respondent of his injury by participating in completing a written report of accident. This was also the last day claimant performed work for respondent.

(3) Did claimant provide respondent with timely notice?

PRINCIPLES OF LAW

K.S.A. 44-520 states:

> Except as otherwise provided in this section, proceedings for compensation under the workers compensation act shall not be maintainable unless notice of the accident, stating the time and place and particulars thereof, and the name and address of the person injured, is given to the employer within 10 days after the date of the accident, except that actual knowledge of the accident by the employer or the employer's duly authorized agent shall render the giving of such notice unnecessary. The ten-day notice provided in this section shall not bar any proceeding for compensation under the workers compensation act if the claimant shows that a failure to notify under this section was due to just cause, except that in no event shall such a proceeding for compensation be maintained unless the notice required by this section is given to the employer within 75 days after the date of the accident unless (a) actual knowledge of the accident by the employer or the employer's duly authorized agent renders the giving of such notice unnecessary as provided in this section, (b) the employer was unavailable to receive such notice as provided in this section, or (c) the employee was physically unable to give such notice.

ANALYSIS AND CONCLUSION

Respondent admits receiving notice from claimant on June 28, 2007. Accordingly, notice was timely given to respondent for the June 28, 2007, accident.

(4) Did claimant provide respondent with timely written claim?

PRINCIPLES OF LAW

K.S.A. 44-520a(a) states:

> No proceedings for compensation shall be maintainable under the workmen's compensation act unless a written claim for compensation shall be served upon the employer by delivering such written claim to him or his duly authorized agent, or by delivering such written claim to him by registered or certified mail within two hundred (200) days after the date of the accident, or in cases where compensation payments have been suspended within two hundred (200) days after the date of the last payment of compensation; or within one (1) year after the death of the injured employee if death results from the injury within five (5) years after the date of such accident.

ANALYSIS AND CONCLUSION

Claimant provided the information to Ms. McDowell and assisted her in completing a written accident report on June 28, 2007. Thereafter, a written claim for compensation dated July 12, 2007, was served upon the employer on July 19, 2007. As such, claimant provided written claim within 200 days of the June 28, 2007, accident.

(5) What is the nature and extent of claimant's disability?

PRINCIPLES OF LAW

K.S.A. 44-510c(a)(2) states:

> Permanent total disability exists when the employee, on account of the injury, has been rendered completely and permanently incapable of engaging in any type of substantial and gainful employment. Loss of both eyes, both hands, both arms, both feet, or both legs, or any combination thereof, in the absence of proof to the contrary, shall constitute a permanent total disability. Substantially total paralysis, or incurable imbecility or insanity, resulting from injury independent of all other causes, shall constitute permanent total disability. In all other cases permanent total disability shall be determined in accordance with the facts.

While the injury suffered by the claimant was not an injury that raised a statutory presumption of permanent total disability under K.S.A. 44-510c(a)(2) , the statute provides

that in all other cases, permanent total disability shall be determined in accordance with the facts. The determination of the existence, extent, and duration of the injured worker's incapacity is left to the trier of fact.[8]

In *Wardlow,*[9] the claimant, an ex-truck driver, was physically impaired and lacked transferrable job skills making him essentially unemployable as he was capable of performing only part-time sedentary work. The court, in *Wardlow*, looked at all the circumstances surrounding his condition, including the serious and permanent nature of the injuries, the extremely limited physical chores he could perform, his lack of training, his being in constant pain, and the necessity of constantly changing body positions, as being pertinent to the decision whether the claimant was permanently totally disabled.[10]

ANALYSIS AND CONCLUSION

Claimant said he could not return to work for respondent without accommodation. No accommodated job was offered. Dr. Fluter described claimant as not able to be gainfully employed on a regular basis. Dr. Stein said claimant was realistically unemployable. Dr. MacMillan never examined claimant but nevertheless placed no work restrictions upon him. Vocational expert Mr. Lindahl said claimant was working part time and earning as much as could be expected. Mr. Lindahl also said that earning $150 per week was not substantial, gainful employment. The Board agrees. Given claimant's education, training and experience, his lack of transferrable skills and the geographic area in which he resides, claimant is realistically unemployable on a full time basis and is permanently and totally disabled as that term is defined by the Kansas Workers Compensation Act.

(6) Did claimant make a good faith effort to retain his employment with respondent or find other employment?

PRINCIPLES OF LAW

K.S.A. 44-510e(a) states in part:

> Permanent partial general disability exists when the employee is disabled in a manner which is partial in character and permanent in quality and which is not covered by the schedule in K.S.A. 44-510d and amendments thereto. The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the

[8] *Boyd v. Yellow Freight Systems, Inc.*, 214 Kan. 797, 803, 522 P.2d 395 (1974).

[9] *Wardlow v. ANR Freight Systems*, 19 Kan. App. 2d 110, 113, 872 P.2d 299 (1993).

[10] *Id.* at 114-15.

> ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. . . . An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.

In *Foulk*,[11] the Kansas Court of Appeals held:

> The legislature clearly intended for a worker not to receive compensation where the worker was still capable of earning nearly the same wage. Further, it would be unreasonable for this court to conclude that the legislature intended to encourage workers to merely sit at home, refuse to work, and take advantage of the workers compensation system.

Later, in *Copeland*,[12] the Court of Appeals stated:

> In attempting to harmonize the language of K.S.A. 44-510e(a) with the principles of *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995), the factfinder must first make a finding of whether a claimant has made a good faith effort to find appropriate employment. If such a finding is made, the difference in pre- and post-injury wages can be made based on the actual wages.

The good faith of an employee's efforts to find or retain appropriate employment is determined on a case-by-case basis.[13]

The Kansas Court of Appeals in *Watson*[14] held the failure to make a good faith effort to find appropriate employment does not automatically limit the permanent partial general disability to the functional impairment rating. Instead, the court reiterated that when a worker failed to make a good faith effort to find employment, the post-injury wage for the permanent partial general disability formula should be based upon all the evidence, including expert testimony concerning the capacity to earn wages.

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[11] *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 284, 887 P.2d 140, (1994), *rev. denied* 257 Kan. 1091 (1995).

[12] *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, Syl. ¶ 7, 944 P.2d 179 (1997).

[13] *Parsons v. Seaboard Farms, Inc.*, 27 Kan. App. 2d 843, Syl. ¶ 3, 9 P.3d 591 (2000).

[14] *Watson v. Johnson Controls, Inc.*, 29 Kan. App. 2d 1078, 36 P.3d 323 (2001).

> In determining an appropriate disability award, if a finding is made that the claimant has not made a good faith effort to find employment, the factfinder must determine an appropriate post-injury wage based on all the evidence before it. This can include expert testimony concerning the capacity to earn wages.[15]

Despite clear signals from recent decisions of the Kansas Supreme Court that the literal language of the statutes should be applied and followed whenever possible,[16] there has yet to be a specific repudiation of the good faith requirement by the Supreme Court. Absent an appellate court decision overturning *Copeland* and its progeny, the Board is compelled by the doctrine of *stare decisis* to follow those precedents. Consequently, the Board must look to whether claimant demonstrated a good faith effort post injury to perform the accommodated job with respondent and, thereafter, to find appropriate employment.

ANALYSIS AND CONCLUSION

Given the Board's finding that claimant is permanently and totally disabled, the question of whether claimant is entitled to a permanent partial disability award based on the work disability formula in K.S.A. 44-510e is no longer at issue. Accordingly, the issue of whether claimant made a good-faith post-injury job search is moot.

Attorney Fee

Although the ALJ approved the attorney fee retainer in this case, the record does not contain a filed fee agreement between claimant and his attorney. K.S.A. 44-536(b) mandates that the written contract between the employee and the attorney be filed with the Director for review and approval. Should claimant's counsel desire a fee be approved in this matter, he must file and submit his written contract with claimant to the ALJ for approval.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Bruce E. Moore dated June 5, 2008, is modified as to the claimant's date of accident but is otherwise affirmed.

Claimant is entitled to 6.14 weeks of permanent total disability compensation at the rate of $388.84 per week followed by permanent total disability compensation at the rate of $470.22 per week, not to exceed $125,000 for a permanent total general body disability.

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[15] *Id.* at Syl. ¶ 4.

[16] See *Casco v. Armour Swift-Eckrich*, 283 Kan. 508, 154 P.3d 494 (2007), and *Graham v. Dokter Trucking Group*, 284 Kan. 547, 161 P.3d 695 (2007). See also *Stephen v. Phillips County*, No. 97,254, unpublished opinion of the Kansas Court of Appeals filed January 18, 2008.

As of September 19, 2008, there would be due and owing to claimant 6.14 weeks of permanent total disability compensation at the rate of $388.84 per week in the sum of $2,387.48 plus 58 weeks of permanent total disability compensation at the rate of $470.22 per week in the sum of $27,272.76 for a total due and owing of $29,660.24, which is ordered paid in one lump sum less amounts previously paid. Thereafter, the remaining balance in the amount of $95,339.76 shall be paid at $470.22 per week until fully paid or until further order of the Director.

IT IS SO ORDERED.

Dated this _____ day of September, 2008.

_____
BOARD MEMBER

_____
BOARD MEMBER

_____
BOARD MEMBER

c: Jeffrey E. King, Attorney for Claimant
Mickey W. Mosier, Attorney for Respondent and its Insurance Carrier
Bruce E. Moore, Administrative Law Judge